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No. 87-1555

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JAMES H. BURNLEY IV, SECRETARY,
DEPARTMENT OF TRANSPORTATION, *et. al.*,

Petitioners,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et. al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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16 pp

TABLE OF CONTENTS

QUESTION PRESENTED

Whether regulations promulgated by the Federal Railroad Administration — mandating blood and urine tests of railroad employees who are involved in certain train accidents and fatal incidents and authorizing breath and urine tests after certain accidents, incidents, and rule violations — violate the Fourth Amendment on the ground that they do not require a showing of "particularized suspicion" of drug or alcohol impairment prior to the testing.

TABLE OF AUTHORITIES

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On February 29, 1988, this Court granted the petition for a writ of certiorari in *National Treasury Employees Union* v. *von Rabb*, No. 86-1879, a case in which the constitutionality of the United States Customs Service's drug testing program is at issue. The *von Rabb* case, as the Solicitor General states in his petition in the instant case, "present[s] the same ultimate legal question" as is presented here. (Pet. at 14). And the briefing process in *von Rabb* is well underway. Against that background — and for the reasons that follow — we suggest that this Court should follow its normal practice and defer action on the certiorari petition pending the decision on the merits in *von Rabb*.

1. At the outset we fully recognize that the court of appeals disagree with each other as to the appropriate method of analysis in cases challenging the constitutionality

of a drug-testing program.[1] *Von Rabb* will afford this Court the opportunity to resolve this conflict in principle among the lower courts and to clarify the mode of analysis that should be applied in cases of this type. It is therefore *not* necessary for the Court to grant certiorari in this case in order to enable the Court to consider these important issues.

2. The Solicitor General advances two arguments in support of his request that the Court "grant plenary review in both cases, rather than hold the present case pending the disposition of *von Rabb*." (Pet. at 19). Neither argument can withstand analysis.

First, the Solicitor General argues that "there is no reason to expect that the Ninth Circuit would reach a different result on remand, regardless of how this Court decides *von Rabb*." (Pet. at 19). That *ad hominem* attack on the court below — which so far as we are aware has no support in the Ninth Circuit's response to prior demands — demeans the Solicitor General rather than, as was intended, the lower court.

Second, the Solicitor General contends that because the drug testing in this case, unlike the testing in *von Rabb*, is animated by safety concerns, "the issues presented by this case neatly complement those presented by *von Rabb*" and that by "granting review in both cases, the Court will be able to consider the requirements of the Fourth Amendment

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[1] The court below expressly criticized the decisions in *von Rabb* and in *Division 241 Amalgamated Transit Union* v. *Suscy*, 538 F.2d 1264 (7th Cir. 1976), *cert. denied*, 429 U.S. 1029, because the latter "did not consider the crucial question which is the foundation of the reasonableness test, *i.e.*, whether the search is justified at its inception." (Pet. App. at 31a). And the court below likewise criticized the decision in *McDonell* v. *Hunter*, 809 F.2d 1302 (8th Cir. 1987), because "th[at] court simply weighed the strong interest in prison security against the urinalysis which it held to be relatively less intrusive than body searches and found the intrusion into the guards' expectation of privacy to be reasonable." (Pet. App. at 31a).

against a wider and more representative backdrop of competing interests, and therefore provide better guidance to the lower courts." (Pet. at 14 and 19-20). But the fact of the matter is that this case is all but *sui generis* and thus provides a singularly inappropriate vehicle for instructing the lower courts on how to apply the general principles that will be stated in *von Rabb* to a concrete case.

Perhaps the most important factor that sets this case apart from all other cases is that the testing is *not* being performed by a public employer on public employees. Rather, the government in this case is acting in the classic role of law maker, and is compelling *private* employers to test *private* employees without regard to whether the employers view such testing as appropriate.

The Solicitor General himself has argued, in initially opposing certiorari in *von Rabb*, that "the employment context is critically important in assessing the propriety of the program" because (according to the Solicitor General) "public employees' legitimate expectations of privacy in that setting are diminished, and the government as an employer has important interests beyond ordinary law enforcement interests." (Mem. for Resp. in No. 86-1879 at 9-10). Thus this case cannot aid the Court in illuminating these "critically important" issues.[2]

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[2] In contrast, the appellate court decisions in *Suscy, supra, von Rabb, supra*, and *McDonell, supra*, all involved testing of public employees, as did the district court decisions in *Lovvorn* v. *City of Chattanooga*, 647 F. Supp. 875 (E.D. Tenn. 1986); *American Federation of Government Employees* v. *Dole*, 670 F. Supp. 445 (D. D.C. 1987); *PBA* v. *Township*, 672 F. Supp. 779 (D. N.J. 1987); *Rushton* v. *Nebraska Public Power District*, 653 F. Supp. 1510 (N.D. Neb. 1987); *American Federation of Government Employees* v. *Weinberger*, 651 F. Supp. 726 (S.D. Ga. 1986); *Taylor* v. *O'Grady*, 669 F. Supp. 1422 (N.D. Ill, 1987); *Feliciana* v. *Cleveland*, 661 F. Supp. 578 (N.D. Ohio 1987); *Mullholland* v. *Army*, 660 F. Supp. 1565 (E.D. Va. 1987); *Capua* v. *City of Plainfield*, 643 F. Supp. 1507 (D. N.J. 1986); *Rostic* v. *McClendon*, 630 F. Supp. 245 (N.D. Ga. 1986); *National Federation of Federal Employees* v. *Carlucci*, 2 Ind. Empl. Rights 1709 (D. D.C. March 1, 1988); *Transport Workers Union* v. *SEPTA*, 2 Ind. Empl. Rights 1804 (E.D. Pa. Jan. 19, 1988).

In addition, the regulation at issue here contains a number of unique features which sets this case apart from other cases challenging drug testing. For example, under the regulation the class of employees subject to testing are those employees covered by the Federal Hours of Service Act (45 U.S.C. § 61-64b); this means that certain crafts (and all management employees) are excluded from testing even though some exempt employees perform the same functions as covered employees. *See* 49 C.F.R. § 219.5(d). Within the class covered, testing is required whenever a train is involved in a major accident, regardless of what caused the accident,[3] and testing is required of the entire crew regardless of the role played by particular individuals (except where a railroad representative can immediately determine that a particular employee had no role in the cause of the accident), *see* 49 C.F.R. § 219.203(a) (2), (3).[4] Although the point of the test is to uncover employee impairment that could have affected job performance, and although the regulation contains a definition of impairment with respect to alcohol levels, no similar definition (or threshold level) is established with respect to controlled substances. *See* 49 C.F.R. § 219.101(a)(2)(ii), .309(b)(2). The relevance of all of these factors would have to be considered if the Court were to grant plenary review in this case. For all these reasons, we believe this is not a useful case to attempt to further elucidate the law pertaining to drug testing.

In all events, we submit, at least this much is clear: there is no reason for the Court to attempt to decide at this time whether this case provides a "neat complement" to *von*

[3] The record reveals, for example, that even when a train accident is caused by tornado-like winds, the crew is tested for drugs. (*See* Resp. App. A).

[4] Ironically, no testing is required of highway grade crossing accidents even though a majority of all deaths on the railroads occur in such accidents. *See* 49 C.F.R. § 219.201(b).

Rabb, or whether granting review here is appropriate to "offer important direction to [the] lower courts and the government," (Pet. at 20). Those questions can best be answered after this Court renders its decision in *von Rabb*. At that time this Court will be able to assess what issues remain open after *von Rabb*, whether those issues are appropriate for an immediate decision by this Court or should instead be considered by the lower courts in light of *von Rabb*, and whether this case (or perhaps some other case which may reach the Court while *von Rabb* is *sub judice*) provides an appropriate vehicle for addressing any issues this Court believes it ought to address. Accordingly, the instant petition should be held pending the decision in *von Rabb*.

3. The Solicitor General also argues that "the decision in this case conflicts sharply with decisions in other circuits." (Pet. at 13). That argument as we noted at the outset does not address the question whether certiorari should be granted at this time or whether this case should be held pending *von Rabb*. In any event, the Solicitor General is wrong in so contending.

The Fourth Amendment proscribes unreasonable searches. As this Court reaffirmed just last Term, "[a] determination of the standard of reasonableness . . . requires 'balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.' " *O'Connor* v. *Ortega*, ____ U.S. ____, 1075 S. Ct. 1492, 1499 (1987). Thus, " 'what is reasonable depends on the context within which a search takes place.' " *Id.*, quoting *New Jersey* v. *T.L.O.*, 469 U.S. 325, 337 (1985). The appellate court decisions addressing the constitutionality of various drug testing programs turn on the facts of the various cases.

For example, it is true, as the Solicitor General states, that in *Suscy, supra*, "the Seventh Circuit approved a drug and alcohol testing program for bus drivers who were involved in serious accidents." (Pet. at 17). But in that case "no medical testing . . . [wa]s required unless two supervisory employees concur[red]," *id.* at 1267, and "the record refuted the possible existence of any interpretation by the . . . supervisory personnel which would allow the administration of blood tests or urinalysis *except where there is a reasonable basis for suspicion of alcohol or drug use*," (Brief for the Chicago Transit Authority in *Suscy* at 30-31). In this case, in contrast, testing is mandatory after any accident regardless of whether "a reasonable basis for suspicion of alcohol or drug use" exists, and even though the record indicates that alcohol or drug impairment has been a factor in only a minute fraction — only .0076% (76/10,000's of 1 percent) — of train accidents or incidents from 1975 to 1984. Indeed, testing is required — and has occurred — here even where it is positively established that an accident was caused by natural forces beyond human control. (Resp. App. A).

The appellate court cases which have upheld testing without individualized suspicion are factually distinguishable from the instant case as well. The Solicitor General cites the Fifth Circuit's decision in *von Rabb*, 816 F.2d 170, as conflicting with the decision below, *see* Pet. at 15, but, as the Solicitor General also expressly acknowledges, there are a number of "fundamental differences" between this case and *von Rabb*, *see* Pet. at 18. The court below was likewise careful "to distinguish the case before us from the Third Circuit's decision in *Shoemaker* v. *Handel*, 795 F.2d 1136 (3rd Cir. 1986), *cert. denied*, 107 S.Ct. 577 (1986)," noting that *Shoemaker* involved testing of jockeys who already are subject to intensive state regulation, *see* Pet. App. at 20a-21a.[5] And *McDonnell, supra*, which upheld "systematic random" testing of prison guards, 809 F.2d at 1308, is distinguishable because the testing there involved public (rather than private) employees; the test results in that case were not used punitively; and the governmental interest in that case — to identify prison guards who were drug users (and not merely employees who were reporting to work under the influence of drugs) — had a far closer fit to the program than is the case here.[6]

In sum, the appellate court decisions illustrate that government-mandated drug testing varies widely from jurisdiction to jurisdiction and from case to case in terms of *e.g.*, the category of employees subject to testing; the method of selecting individuals from among that group for testing; the use that is made of the test results; and the government interests underlying the testing program. Given that fact, this area is particularly well-suited to the Court's usual

[5] Indeed in *Shoemaker* the Third Circuit had found that [w]hen jockeys chose to become involved in this pervasively-regulated business and accepted a state license, they do so with the knowledge that the [Racing] Commission would exercise its authority to assure public confidence in the integrity of the industry" and that the Commission "had promulgated regulations providing for warrantless searches of stables." 795 F.2d at 1142.

Shoemaker also is distinguishable from the instant case on other grounds: unlike railroad employees, the tested jockeys in *Shoemaker* could request a hearing to contest the test, the results, and the imposition of any sanctions; for a first violation the jockey was required simply to enter into a treatment program; and was not liable for any penalty until the third or subsequent violation; and the State of New Jersey agreed in *Shoemaker* not to seek criminal prosecution based on drug testing results. Railroad workers are subject to Federal criminal sanctions where tests show alcohol or drug use as the cause of a railroad accident (18 U.S.C. §§ 341-343).

[6] Petitioner's reliance on *Jones* v. *McKenzie*, 833 F.2d 335 (D.C. Cir. 1987), to create a conflict with the decision below is wholly misplaced; in *Jones* the court of appeals *invalidated* the drug testing program at issue there for the very reason on which the court below in the instant case heavily relied: "the tests cannot measure current drug intoxication or degree of impairment." Pet. App. 28a, *citing Jones*.

practice of grating certiorari in one case at a time, and articulating general principles which can then be applied by the lower courts to other factual patterns.

CONCLUSION

For the foregoing reasons, the Court should defer acting on the petition for a writ of certiorari until after the Court issues its decision in *von Rabb*.

Respectfully Submitted,

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APPENDIX A

March 21, 1986
ICC-243-2

John H. Riley, Administrator
Federal Railroad Administration
400 Seventh Street Southwest
Washington, D.C. 20590

Dear Mr. Riley:

I wish to file a formal protest against the St. Louis Southwestern Railway Company and its carrier officers who forced an engineer and fireman, represented by this Organization, to provide blood and urine samples and the manner in which the samples were obtained for toxicological testing under the Final Rule issued by the Federal Railroad Administration as taken from the August 2, 1985 Federal Register and in violation of Subpart C, Section 219.201 and Section 219.203 as found on pages 31571 and 31572.

I also wish to protest the ambiguous language as found in Section 219.201(c), parts 1, 2 and 3, and all of Sections 219.203 and 219.205 in the above mentioned Final Rule.

On March 11, 1986 Engineer D.R. Green and Fireman D.V. Case were called in pool freight service at Pine Bluff,

Arkansas, to operate train HOASM, engine 7780, Pine Bluff to Jonesboro, Arkansas, on duty at 1:45 p.m.

Enroute to Jonesboro, Arkansas, at approximately 8:55 p.m., the train was struck by high winds or a tornado which resulted in 27 cars of the train being derailed. This fact is undisputed.

At approximately 1:25 a.m., Trainmaster-Agent T. E. Stokes from Memphis, Tennessee, and Assistant Division Superintendent Carl Bradley from Pine Bluff, Arkansas, were at the scene of the derailment and forced the entire crew to submit to the test using the Final Rule as their authority.

The tests were not completed until about 3:15 a.m. on March 12, 1986 and the crew was allowed something to eat around 3:25 a.m. Remember, this crew's last meal would have been around 12:30 p.m. on March 11, 1986. Where is the immediate taking of the test or concern for the crew with handling such as this?

The crew was taken to a small hospital at Brinkley, Arkansas, which was not equipped to take the samples as per the rule. The Carrier had knowledge of this and had contacted the company nurse at Little Rock, Arkansas, to have her bring the kit to the hospital at Brinkley.

As the BLE General Chairman representing the engineers and firemen on this property, I had told Mr. Bradley that I was going to file a complaint the next time he forced a crew to take a test without probable cause. This is not the first such violation. I have not kept records and I cannot give an exact number of tests that have been performed on this property without probable cause.

The FRA has suggested that it may be necessary to test 150 to 200 incident in the industry. The Southern Pacific and Cotton Belt have already tested that many employees to

date. I do not know the results on the Southern Pacific, but I can assure you the percentage of positive tests are considerably less than five percent on this property. Where is the good faith determination or probable cause with these percentages?

The abuse of the testing practices and constant harassment of the employees on this property constitutes flagrant violations of due process and must be challenged. When the FRA writes rules such as this, they leave this door wide open for the flagrant repeated violations, which create nothing but blatant harassment for our members.

If the FRA is going to force these rules on the employees, they must be charged with the responsibility of enforcing the rules. It would appear at this time that they either refuse this responsibility or lack the ability to do so.

When we have an incident caused by an act of God and have the crew handled in this manner, it clearly demonstrates the Carrier's continual harassment and now they have the FRA rules to hide behind.

There is no question as to the results of the tests that were performed in this incident. Regardless of the test results, we declare the samples invalid because of the procedure used in taking the samples, which were in violation of the procedures prescribed under the Final Rule.

We respectfully request a thorough investigation into the incident and the Final Rule to assure that similar incidents will not be repeated in the future.

Respectfully,

D. E. Thompson